No. 86-456

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

October Term, 1986

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FAZAL AHMAD,

*Petitioner,*

*v.*

STATE OF NEW YORK,

*Respondent.*

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**On Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department**

## RESPONDENT'S BRIEF IN OPPOSITION

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## Question Presented

1. Whether, absent a showing that trial counsel's claimed forensic deficiencies were the product of his ignorance of fundamental principles of criminal law and procedure, rather than of strategic and tactical considerations, *and* absent a further showing that it is reasonably probable that, had those claimed deficiencies not occurred the result of petitioner's trial would have been more favorable to him, the petition presents a federal constitutional question deserving this Court's review?

## List of Parties

The parties to the proceedings in the New York State courts were the petitioner Fazal Ahmad and the respondent State of New York.

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## RESPONDENT'S BRIEF IN OPPOSITION

### Decisions Below

The order denying permission to appeal to the New York Court of Appeals (Alexander, J.) has not yet been officially reported. (A copy of that order appears at p. A-1 of the Petition for Certiorari.)

While the Appellate Division decision is also unreported officially, it is reported at page 536 of Volume 503 of New York Supplement, Second Series. (A copy of the decision, as it appears in that publication [503 N.Y.S.2d 536], is included at page A-1, *infra.*)

## Jurisdiction

The certiorari jurisdiction of the Court is invoked under 28 U.S.C. § 1257, subd. (3). Respondent does not contend that the Court is without jurisdiction in this matter.

## Constitutional Provisions Involved

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

Fourteenth Amendment:

> "No state shall * * * deprive any person of life, liberty, or property without due process of law."

## Statement of the Case

Petitioner, a Medicaid provider, was convicted in the Supreme Court, New York County, of 32 counts of Offering a False Instrument for Filing in the First Degree and one count of Grand Larceny in the Second Degree, all felonies. The proof adduced at trial was to the effect that he had obtained money under false pretenses by (1) knowingly misbilling the Medicaid system for rendering "psychotherapy"[1] to his patients when he was not trained in

1. "Psychotherapy" billings represented over $300,000, or approximately 45%, of petitioner's total Medicaid earnings over a five-year period. He received $30 per 31-to-60-minute session of "psychotherapy" and $15 for each session of a half hour or less. Proper billing would have garnered him only $7 for each such non-specialist general office visit, whatever its duration.

psychotherapy, psychiatry or psychology and was not recognized by the Department of Health as a specialist in any of those disciplines and (2) deliberately overstating on the invoices he submitted to the New York State Department of Social Services the amount of time he actually spent with his patients.

Documentary evidence—in the form of Medicaid invoices and computer printouts derived therefrom—established beyond peradventure that, with respect to each of 41 dates, petitioner had billed the Medicaid system for rendering—in addition to pediatric and general practitioner services—31 to 60 minutes of psychotherapy to 19 or more patients. This evidence of knowing and willful misbilling was supported by testimony of petitioner's former patients that he rarely, if ever, spent as much as 30 minutes with them and that he never provided them with psychotherapy.

It is against a backdrop of overwhelming evidence of his guilt of grand larceny and related crimes[2] that petitioner argues that certain acts of commission and omission by his trial counsel constituted "ineffective assistance," in the sense that they were "contrary to prevailing professional norms" (*Kimmelman* v. *Morrison*, U.S. , , 91 L.Ed. 2d 305, 326 [1986]). This brief opposing a grant of certiorari argues that the petition presents no issues of widespread concern regarding the Sixth Amendment "assistance of counsel" guarantee. Respondent further

2. The May 23, 1985, judgment of conviction was unanimously affirmed without opinion by the Appellate Division, First Department, on June 19, 1986. Permission to appeal to the Court of Appeals was denied by the Hon. Fritz W. Alexander on July 23, 1986.

argues that petitioner has satisfied neither the "deficient performance" nor the "prejudice" prong of *Strickland* v. *Washington*, 466 U.S. 668 (1984).

## Reasons for Denying the Writ

In essence, petitioner contends that his trial lawyer's performance was so deficient "that counsel was not functioning as the 'counsel' guaranteed [him] by the Sixth Amendment" (*Strickland* v. *Washington*, 466 U.S. 668, 687 [1984]), *i.e.* that counsel's assistance was not "reasonably effective." *Ibid.*

That contention was rejected by the Appellate Division, which affirmed petitioner's conviction nine days after his appeal was argued, and the New York Court of Appeals did not deem the issue, as presented by this case, worthy of review.

Ineffective assistance claims are routinely advanced by disgruntled defendants. Ordinarily such claims, being dependent upon an assessment of the peculiar facts of each case, do not present issues of "sufficient general importance" (*United States* v. *Nobles*, 422 U.S. 225, 241-242 n. 16 [1975]) to warrant review by this Court.[3]

Furthermore, this case presents no occasion for the Court to expand upon its opinions in *Strickland* v. *Washington, supra*, and *Kimmelman* v. *Morrison*, U.S. , 91 L.Ed. 2d 305 (1986), for here, as in *Washington, supra*,

3. Compare *Strickland* v. *Washington, supra*, 466 U.S. at 684, where this Court decided an ineffective assistance claim because it had not previously had occasion to articulate a constitutional counsel-effectiveness standard.

466 U.S. at 700, 104 S. Ct. at 2071, there was a "double failure" to show either deficient performance[4] or sufficient prejudice. Even if it is assumed *arguendo* that petitioner has satisfied the "deficient performance" portion of the *Washington* standard,[5] he has given no more than lip service to the prejudice requirement, *i.e.* "a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland* v. *Washington*, 466 U.S. at 694. While petitioner

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4. As petitioner observes (Petition for Certiorari, p. 8), certain egregious lapses by a defense attorney, such as his utter failure to conduct pretrial discovery, may constitute ineffective assistance. Petitioner fails to acknowledge, however, that the *Kimmelman* v. *Morrison*, ( U.S. , 91 L.Ed. 2d 305) holding to that effect was predicated on the Court's finding that counsel's omission "was not based on 'strategy,' but on counsel's mistaken beliefs that, the state was obliged to take the initiative and turn over all of its inculpatory evidence to the defense. . . ." U.S. at , 91 L.Ed. 2d at 326.

Petitioner's attempt to equate counsel's claimed faults in this case [see *infra*, p. 5, n.5] with those focused upon in *Morrison*, *supra*, must fail because he has not shown that the conduct of which he complains was the product of counsel's ignorance of fundamental principles of criminal law and procedure, rather than of strategic and tactical considerations.

5. The representation provided by petitioner's trial counsel was far from deficient. While the Petition for Certiorari castigates counsel for, in his opening, conceding inadvertent misbilling by his client (Petition, p. 7), that concession appropriately foreshadowed petitioner's only plausible line of defense, *i.e.* lack of intent to defraud.

Baseless as well is petitioner's attack upon counsel's supposed failure to guard against the prosecutor's "appeal to class prejudice" (*Id.* at 8). No such objectionable conduct was engaged in by the prosecutor; rather, as trial counsel apparently realized, the prosecutor's inquiries into petitioner's investments were intended to negate the latter's claim that his billing errors were the product of his lack of sophistication in American business practices.

Finally, petitioner, characterizing this prosecution as a "complex 'white collar' case," faults counsel's claimed unfamilarity with the thousands of documents admitted in evidence at trial (*Id.* at 5-7). What petitioner fails to acknowledge, however, is that the documents —principally Medicaid invoices and patient charts—were records petitioner himself maintained. The records were undoubtedly readily comprehensible to counsel, who presumably also had the benefit of petitioner's assistance in analyzing them.

broadly claims (Petition for Certiorari, p. 9) that "the prejudice prong [of *Washington, supra*] was satisfied in that the petitioner demonstrated the adverse impact counsel's omissions had on the defense," that assertion ignores the overwhelming proof before the jury of petitioner's guilt.

The larcenous scheme perpetrated by petitioner, a physician enrolled in the Medicaid program, took on two forms: (1) his utilization of specialist billing codes not properly available to him and (2) his consistent overstatement on Medicaid invoices of the amount of time he spent with his patients. By its verdict, the jury found that petitioner had intentionally engaged in both forms of deception.

Assuming, for argument's sake, that had counsel been better prepared, he might have put forth more convincingly petitioner's defense to the first allegation, *i.e.* "that what he billed Medicaid for was counselling Medicaid recipients, not psychotherapy as alleged by the prosecution" (*Id.* at 7), the best-prepared counsel could have done little to blunt the virtually incontrovertible evidence that petitioner had repeatedly billed Medicaid for many more hours than he had actually spent with his patients. Petitioner's former patients uniformly testified that he almost always spent substantially less than 30 minutes with them; yet the vast majority of his "psychotherapy" billings were for 31-to-60 minute sessions. Moreover, a computer analysis of petitioner's billings revealed that he, a pediatrician, had on October 18, 1982, in addition to attending to his usual office duties and participating in prayer sessions outside the office, supposedly rendered between 13½ and 26 hours of "psychotherapy" to twenty-six patients. It is significant to an

assessment of counsel's claimed deficiencies that the billings of October 18, 1982, did not constitute an isolated occurrence. For on a date in 1983, petitioner purportedly provided psychotherapy to twenty-four patients for a minimum of twelve hours and twenty-four minutes, and on *seven separate occasions* he billed for having provided a total of eleven hours and fifty-three minutes of psychotherapy to twenty-three patients.

Therefore, contrary to petitioner's claim that his trial lawyer's failings substantially contributed to his conviction, the conviction resulted from the jury's careful consideration of the overwhelming testimonial and documentary evidence of his guilt. There being no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*Strickland* v. *Washington*, *supra*, 466 U.S. at 694), the petition for certiorari presents no question warranting review by this Court. Accordingly, it should be denied.

## Conclusion

**For the above-stated reasons, the petition for a writ of certiorari should be denied.**

Respectfully submitted,

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October 17, 1986

# APPENDIX

## APPENDIX

**Reported Decision of Appellate Division, First Judicial Department, *People v. Ahmad,* (503 N.Y.S. 2d 536).**

THE PEOPLE OF THE STATE OF NEW YORK,
*Respondent,*

v.

FAZAL AHMAD,
*Defendant-Appellant.*

Supreme Court, Appellate Division, First Department. June 20, 1986. D.H. Zuckerman, New York City, for respondent. R.E. Mischel, New York City, for defendant-appellant. Judgment, Supreme Court, New York County (John Bradley, J.), rendered on May 23, 1985, unanimously affirmed. The case is remitted to the Supreme Court, New York County, pursuant to CPL 460.50(5). No opinion.

SANDLER, J.P., and ROSS, ASCH, FEIN and MILONAS, JJ., concur.